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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of

Review of the Pioneer's  
Preference Rules

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ET Docket No. 93-266

To: The Commission

COMMENTS

BELLSOUTH CORPORATION  
BELLSOUTH TELECOMMUNICATIONS, INC.  
BELLSOUTH CELLULAR CORPORATION  
MOBILE COMMUNICATIONS CORPORATION  
OF AMERICA

William B. Barfield  
Jim O. Llewellyn

1155 Peachtree Street, N.E.  
Atlanta, Georgia 30367-6000

L. Andrew Tollin  
Michael Deuel Sullivan

Wilkinson, Barker, Knauer & Quinn  
1735 New York Avenue, N.W.  
Washington, D.C. 20006  
(202) 783-4141

Charles P. Featherstun  
David G. Richards

1133 21st Street, N.W.  
Washington, D.C. 20036  
(202) 463-4132

Their attorneys.

November 15, 1993

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**COMMENTS**

BellSouth Corporation, BellSouth Telecommunications, Inc., BellSouth Cellular Corporation, and Mobile Communications Corporation of America (collectively "BellSouth") hereby submit their comments on the Commission's *Notice of Proposed Rule Making* ("NPRM") in this proceeding.<sup>1/</sup> For the following reasons, BellSouth urges the Commission to abandon its pioneer preference program, in view of the enactment of auction legislation and the inherent lack of workable standards for awarding preferences.

**SUMMARY**

BellSouth urges the Commission to eliminate its pioneer's preference rules because they conflict with the Congressional objectives set forth in the new auction statute and represent a policy that cannot be reasonably implemented. The Commission is better off leaving the issue of encouraging innovation to the U.S. Patent and Trademark Office. The elimination of the rules should be fully applicable to the Narrowband and Broadband PCS proceedings, because those proceedings are not yet final and the Commission has not yet set an opportunity for filing applications.

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<sup>1/</sup> FCC 93-477 (Oct. 21, 1993), *summarized*, 58 Fed. Reg. 57,578 (Oct. 26, 1993).

If the Commission finds that the concept of a pioneer's preference is not inherently unlawful, it must, at a minimum, modify its procedures to comply with the auction statute. The auction process itself provides a substantial incentive to "build a better mousetrap," because of the economic value of innovation. Accordingly, the winner of a pioneer's preference should not be insulated from mutually exclusive applications, but should instead bid for the license against other interested parties.

**I. THE CURRENT PIONEER'S PREFERENCE RULES MUST BE ELIMINATED AS A MATTER OF LAW AND POLICY**

The Commission adopted its pioneer's preference rules in 1991 in large part to counter the lack of incentive to innovate under the lottery process.<sup>2/</sup> The pioneer's preference policy guarantees a license to innovators meeting certain criteria, bypassing the lottery process. Under this policy, as codified in Section 1.402 of the Rules, a pioneer's preference would be awarded if the Commission finds that --

the applicant has demonstrated that [it] . . . has developed an innovative proposal that leads to the establishment of a service not provided or a substantial enhancement of an existing service. Additionally, the preference will be granted only if rules, as adopted, are a reasonable outgrowth of the proposal and lend themselves to the grant of a preference.<sup>3/</sup>

The Commission's policy of awarding pioneer's preferences is an example of good intentions gone bad. The policy simply does not, and cannot, work. Moreover, the enactment of auction legislation eliminates any justification for creating special incentives

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<sup>2/</sup> *Pioneer's Preference Rulemaking*, Gen. Docket 90-217, *Report and Order*, 6 FCC Rcd. 3488 (1991), *recon. in part*, 7 FCC Rcd. 1808 (1992), *further recon. denied*, 8 FCC Rcd. 1659 (1993).

<sup>3/</sup> 47 C.F.R. § 1.402(a).

to innovate, and in fact establishes statutory objectives that require elimination of the current pioneer's preference policy.

**A. Pioneer's Preferences Are Contrary To The Auction Statute**

The Commission noted in the NPRM that its competitive bidding authority<sup>4</sup> is officially neutral as to the pioneer's preference policy.<sup>5</sup> Notwithstanding this apparent neutrality, the auction process renders pioneer's preferences unnecessary, because auctions themselves provide sufficient incentives to true innovators. Moreover, the award of preferences is inconsistent with the licensing objectives established by the statute.

The Commission adopted the pioneer's preference policy when licensees were selected by lottery. Statistically, an innovator would stand only a small chance of receiving a license in a lottery -- its technological expertise gave it no advantage. Thus, an innovator had little incentive to advocate a new service, when it would not have any realistic chance of getting a license to take advantage of its innovation. The pioneer's preference was intended to counter the disincentive to innovation caused by the lottery system.<sup>6</sup>

To the extent that rationale was ever valid, it evaporated once Congress authorized auctions. BellSouth agrees with the Commission that under the auction regime, the marketplace will confer an appropriate benefit on an innovator that makes

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<sup>4</sup> 47 U.S.C. § 309(j), *enacted in* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002, 107 Stat. 387 (Aug. 10, 1993) ("Budget Act").

<sup>5</sup> See NPRM at ¶ 9, *citing* 47 U.S.C. § 309(j)(6)(G).

<sup>6</sup> NPRM at ¶¶ 5-6.

it unnecessary to grant pioneer's preferences.<sup>27</sup> An innovator will be able to develop a business plan that takes account of the economic benefits of its innovation. An innovation that is expected to increase revenues or lower costs will permit the innovator to value the license higher than competing bidders. Thus, the auction process itself puts a premium on true innovation, rendering the whole preference program unnecessary.

Now that auctions are authorized, the award of pioneer's preferences will result in economically inefficient licensing decisions. The auction permits market forces to select innovations that produce the greatest economic value. For example, an innovation may be valued highly if it makes possible a new service for which there is a large untapped market, or if it allows spectrum to be used more intensively and efficiently. An administrative system for awarding preferences, on the other hand, is not constrained by economic value. Pioneer's preferences might be awarded for economically inefficient innovations. Under a lottery regime, policy reasons might have justified this risk, since the lottery created a disincentive to all innovation. This justification vanishes with the use of auctions. A pioneer's preference award would substitute the judgment of regulators for the judgment of the marketplace.

The statute requires the Commission to take into account a variety of factors in designing its rules to implement auctions. Those objectives effectively preclude continuation of the pioneer's preference policy in its current form.

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<sup>27</sup> See NPRM at ¶ 7.

The first statutory objective is:

(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those in rural areas, without administrative or judicial delays.<sup>87</sup>

The consideration of preference requests and award of preferences before license applications are filed will inevitably delay licensing of the service. Pioneer's preference proposals result in oppositions, reconsiderations, and appeals even before the license applications are filed, resulting in considerable administrative and judicial delay.

Even if there were no delay, however, this objective would be disserved, because preference winners have no incentive or obligation to serve rural areas. The Commission gives preference winners complete discretion to select a service area in which to receive a license. This gives them the opportunity to obtain the license they perceive to have the greatest value -- i.e., a major population center, such as New York or Los Angeles -- and thereby avoid any need to construct a rural system with high costs and low revenue potential. Allowing preference winners to select licenses for a major metropolitan population center is not consistent with the statutory objective of "development and rapid deployment of new technologies, products, and services for the benefit of the public, *including those residing in rural areas . . .*"<sup>88</sup>

The second statutory objective is:

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural

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<sup>87</sup> 47 U.S.C. § 309(j)(3)(A).

<sup>88</sup> 47 U.S.C. § 309(j)(3)(A) (emphasis supplied).

telephone companies, and businesses owned by members of minority groups and women.<sup>10</sup>

The pioneer's preference policy does not result in the creation of opportunities for a variety of businesses not already represented in the field. This is apparent from the PCS proceeding. The sole Narrowband PCS pioneer's preference was awarded to one of the largest paging companies in the United States, which already operates a nationwide paging network. The three tentative preference winners for Broadband PCS are an affiliate of a major newspaper publisher, a major cable television operator, and a major telecommunications equipment manufacturer. Such companies are hardly the economically disadvantaged small businesses, rural telephone companies, and minority- and female-owned businesses to which Congress sought to extend opportunities. In fact, all of the preference requests filed in the PCS proceeding by small businesses were at least tentatively denied.

The third statutory objective is:

(C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource.<sup>11</sup>

Setting aside a license for the preference winner means that the preference winner will receive a time advantage over competitors who have to bid at an auction. The preference winner does not have to wait for the results of the auction or even the award of the license to be certain that it will be a licensee. This gives the preference winner a substantial head start in lining up financing and marketing its service. Because of this

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<sup>10</sup> 47 U.S.C. § 309(j)(3)(B).

<sup>11</sup> 47 U.S.C. § 309(j)(3)(C).



head start, the bidders in the auctions for the remaining licenses will value the licenses lower than they would if all licenses were auctioned simultaneously. The preference winner's head start will make it more difficult or expensive for the others to obtain financing and develop a customer base. As a result, the revenues produced by the auctions for these licenses will be diminished. For these reasons, the award of pioneer's preferences will conflict with the third statutory objective.

The fourth statutory objective is:

(D) efficient and intensive use of the electromagnetic spectrum.<sup>12/</sup>

As BellSouth shows below,<sup>13/</sup> the pioneer's preference policy does not encourage spectral efficiency, but instead gives parties an incentive to seek large, inefficient spectrum allocations. For example, the tentative Broadband PCS preference winners were among the few commenters advocating 40 MHz spectrum blocks. Most commenters urged a smaller allocation for each licensee.

Setting aside licenses for pioneer's preference winners, without subjecting them to mutually exclusive applications, will thus disserve the objectives the Commission must promote under the auction legislation. The preference policy is therefore inconsistent with the statute and should be eliminated.

**B. The Pioneer's Preference Policy Is Unworkable And Contrary To the Public Interest**

For the reasons which follow, the pioneer preference program is unworkable in practice and contrary to the public interest as a matter of policy.

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<sup>12/</sup> 47 U.S.C. § 309(j)(3)(A)-(D).

<sup>13/</sup> See pages 11-12, *infra*.

1. **Lack of standards.** The preference policy has been impossible to apply in any rational manner. The Commission has no meaningful standards for awarding preferences. As Commissioner Barrett has noted, many times there are no clear distinctions between those tentatively awarded a preference and those denied; for that reason, he called for the Commission to establish meaningful criteria for judging the preference requests in each docket:

[I]n this case [Broadband PCS], where there are numerous pioneer preference applicants, I question whether we previously should have issued a public notice to solicit comment on the appropriate specific technical criteria for selecting PCS pioneers. . . . Given the distinctions in technologies and service formats between various dockets involving new services, I am not certain that one case will serve as precedent for a future case in the pioneer preference area. Thus, where there are completely different factors involved in each case, it may be necessary for the Commission to develop specific technical review criteria prior to making a tentative decision in each docket.<sup>14</sup>

The Commission should not attempt to base regulatory decisions on innovation, given the subjective and elusive nature of the subject. Rewarding innovation is fully addressed by the patent laws, and the pioneer's preference policy is duplicative, at best, and counterproductive, at worst. Congress enacted the patent laws<sup>15</sup> for the specific purpose of "promotion of the progress of science and the useful arts."<sup>16</sup> The patent scheme covers all inventions and discoveries that are new and useful,<sup>17</sup> which would

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<sup>14</sup> *New Personal Communications Services*, Gen. Docket 90-314, *Tentative Decision and Memorandum Opinion and Order*, \_\_ FCC Rcd. \_\_\_, 71 Rad. Reg. 2d (P&F) 683, 692 (1992).

<sup>15</sup> The patent laws are contained in Title 35 of the United States Code.

<sup>16</sup> *United States v. Masonite Corp.*, 316 U.S. 265, 278 (1942).

<sup>17</sup> *Dennis v. Pitner*, 106 F.2d 142 (7th Cir. 1939), *cert. denied*, 308 U.S. 606 (1939).

appear to cover any innovation meeting the requirements for a pioneer's preference. The existence of the patent laws eliminates any need for the FCC to involve itself in this highly technical and complex matter.

In awarding pioneer's preferences, the only substantive standard the Commission follows is whether a proposal is "innovative."<sup>18</sup> This is an inherently subjective standard. The Commission does not conduct an exhaustive examination of prior art, as the Patent and Trademark Office does in deciding whether a patent is to be awarded. The FCC does not even consider whether a given technique would be obvious to a skilled engineer in the field, which would be a critical factor in whether to award a patent. Unlike a patent, a pioneer's preference award cannot be collaterally attacked in a private action on the grounds that the awardee was not, in fact, innovative.<sup>19</sup> Moreover, the grant of a pioneer's preference gives the awardee valuable rights not limited to its innovation; the awardee is not required to use its innovative technology once it receives a license.

In deciding whether a proposal is "innovative," the Commission cannot rely on precedent, because of the fact-specific nature of each determination. Yet it does not use

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<sup>18</sup> The standard for making preference awards is whether an applicant "has developed an innovative proposal that leads to the establishment of a new service or a substantial enhancement of a new service," provided that the "rules, as adopted, are a reasonable outgrowth of the proposal and lend themselves to the grant of a preference." 47 C.F.R. § 1.402(a). The key substantive criterion here is the word "innovative."

<sup>19</sup> The issuance of a patent does not automatically confer an exclusive benefit on the patent holder and preclude private challenges at a later date. A competitor who believes a patent is invalid because of prior art or obviousness can infringe the patent and seek to invalidate it if a private infringement action is brought. A pioneer's preference award, on the other hand, cannot be collaterally attacked in a private action. A competitor who believes the awardee had merely used existing technology and was not, therefore, innovative, cannot simply use the frequency licensed to the awardee and defend on the grounds of lack of innovation.

procedures designed to make meaningful factual determinations. In essence, the Commission's policy seems to be that it knows innovation when it sees it. The Commission does not conduct hearings, take expert testimony, or even utilize a panel of independent experts to help evaluate preference proposals. Instead, it uses an informal process of review by a variety of staff members. The comments of these reviewers are not placed in the record and are not subject to challenge. Moreover, the process of making initial tentative grants, followed by final awards when rules are adopted, is inexplicable. Once a tentative conclusion is reached, the final result is virtually foreordained. The arbitrary and *ad hoc* nature of this process speaks for itself.

2. **The race to file puts a premium on short-term innovation.** The pioneer's preference policy causes a race to the FCC in each field where a rulemaking is anticipated.<sup>29</sup> A wide variety of players have their eyes on the spectrum prize and scramble to qualify for a preference. The first filer has an advantage in the ensuing public relations contest, because it can use the fact that it filed first to portray itself as an innovator and belittle subsequent filers as mere copiers and counterfeiters.

Under this system, a premium is placed on relatively minor innovations with a short germination period, even though long-term innovations in the same service or frequency band might have more far-reaching beneficial effects. Only those who can quickly commit a proposal to paper and demonstrate its technical feasibility will be considered. Real innovation is penalized, because it requires serious research and

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<sup>29</sup> All parties must submit their preference requests in advance of issuance of a notice of proposed rulemaking. In some cases, the Commission has issued a public notice establishing a specific deadline for filings. In practice, however, the race is started once any party seeks a preference for a given frequency band, because of the importance of being among the first filers.

development over the long term. As the Narrowband PCS docket showed, innovations that take time to test and document cannot compete with proposals that merely add some bells and whistles to an existing service.<sup>21/</sup>

3. **Unnecessary spectrum allocations are encouraged.** The policy gives parties incentives to advocate new spectrum allocations that are unnecessary. A pioneer's preference has the greatest economic value if spectrum is newly allocated, because that will ensure the preference winner an opportunity for an uncontested license. An innovation that can benefit the public through unlicensed use or through deployment within an existing spectrum allocation will not result in the innovator receiving a valuable license. The pioneer's preference policy therefore gives applicants a strong incentive to persuade the Commission that their innovation requires establishment of a new spectrum allocation (or even a new licensed radio service) that may actually be unnecessary.

In the Narrowband PCS docket, many of the services and technologies proposed by preference seekers could have been accommodated within existing paging or two-way allocations, with rule changes or waivers. For example, Mobile Telecommunication

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<sup>21/</sup> *New Personal Communications Services*, Gen. Docket 90-314 and ET Docket 92-100, *First Report and Order*, 73 Rad. Reg. 2d (P&F) 435, 446-458 (1993), *pets. for recon. pending, appeal docketed sub nom. BellSouth Corp. v. FCC*, No. 93-1518 (D.C. Cir. filed Aug. 20, 1993). The Commission considered proposals for transmitting voice pages digitally, using a cellular-like configuration for transmitting pages, transmitting pages to airplanes, providing improved cordless telephone service, and broadcasting news to facsimile machines, among other proposals. To the extent such proposals were innovative, they were only incrementally so. The winner of the pioneer's preference in that docket proposed to combine technologies used in other services to offer a two-way data and paging service similar in many ways to existing services. The Commission faulted several preference requests because the concepts involved had not been sufficiently developed, or because innovative features had not been shown to be technically feasible. *Id.* at 450-58. Thus, simple, short-term service enhancements won out over innovative concepts requiring long-term development.

Technologies, Inc. ("Mtel") was awarded a pioneer's preference for its proposal to employ an advanced modulation technique to achieve high-speed transmission of information in a simulcast environment. There is no reason why this modulation technique could not be employed on existing paging frequencies, greatly increasing capacity.

4. **Spectral efficiency is discouraged.** The policy, as currently implemented, tends to discourage spectrally efficient innovations. Given the scarcity value of spectrum, parties seeking pioneer's preferences will naturally seek to maximize the value of their anticipated licenses. They therefore have an incentive to advocate allocations of large blocks of spectrum instead of narrower blocks, because of the greater value of a license for a large block. Advocating a highly efficient technology that permits operation in a narrow band or that permits non-interfering operation by multiple licensees would diminish the value of the license that a preference winner would receive. Thus, the preference policy discourages development of technology that might permit more intensive and efficient use of spectrum and lead to narrower spectrum allocations. This is particularly true after a party has been tentatively awarded a preference. For example, the three tentative preference winners in the Broadband PCS proceeding were among those advocating the largest spectrum allocations.<sup>27</sup>

5. **The rulemaking and the pioneer's preference proceeding become inseparable.** Policies and spectrum allocations are influenced by the private consequences for the preference seekers. Each preference seeker lobbies for rules based on its proposal, for the purely private purpose of locking in its preference request. They argue that equity

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<sup>27</sup> *New Personal Communications Services*, Gen. Docket 90-314, *Second Report and Order*, FCC 93-451 at ¶ 37 n.38 (Oct. 22, 1993).

requires adoption of their proposals, because they have invested funds in reliance on the pioneer's preference policy.<sup>23</sup> The Commission may be influenced by such tactics, because it recognizes that preference losers will inevitably appeal. This intertwining of rulemaking and preference awards disserves the public interest. The Commission should adopt the rules and policies that will best serve the public interest, without having to consider what its decision will do to particular potential applicants.

## **II. WHETHER THE PREFERENCE POLICY IS ELIMINATED OR MODIFIED, THE NARROWBAND AND BROADBAND PCS PREFERENCE AWARDEES SHOULD PAY AUCTION PRICES**

Whether the Commission eliminates the pioneer's preference policy or it modifies the policy to require awardees to pay prices established by auctions, the decision should govern all proceedings where awards have not become final. This includes proceedings such as Broadband PCS, where a decision has not been reached. It should also apply to the Narrowband PCS preference award. That award is not final because it remains before the Commission for reconsideration. Moreover, the Commission has not yet adopted rules to permit the filing and grant of applications by the awardee.

The NPRM sought comment on whether a change in policy should apply to Broadband PCS,<sup>24</sup> but tentatively concluded that it should not apply to Narrowband PCS as a "matter of equity," because the disposition of the preference requests in that

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<sup>23</sup> Commissioner Barrett made clear that some of the tentative preference winners in the Broadband PCS docket sought to use the prospective competitive position of preference winners to influence the spectrum allocation decision. *See Second Report and Order*, Dissenting statement of Commissioner Barrett at 5.

<sup>24</sup> NPRM at ¶ 19.

proceeding has already been made.<sup>25/</sup> In fact, both law and equity are on the side of applying the new policy to any preferences awarded in both parts of the PCS proceeding.

Congress specifically intended the auction regime to apply to pending applications as well as those not yet filed. In a special transition rule, Congress specified that the only applications that could be exempted from auctions in services coming under the auction criteria were those accepted for filing prior to July 26, 1993.<sup>26/</sup> No applications were filed by preference awardees, much less accepted by the Commission for filing, by that date.

The Commission has not provided an opportunity for the filing of applications by the preference awardees in Narrowband or Broadband PCS. For Broadband PCS, the Commission has not even made a final selection of the awardees. The Commission has awarded a Narrowband PCS pioneer's preference to Mobile Telecommunication Technologies Corporation ("Mtel"), but it has not adopted rules governing the filing or processing of applications. When the Commission granted Mtel the preference, it adopted only "technical and operational" rules, making clear that rules governing the application and licensing process would require further rulemaking:

The regulatory plan we are adopting for narrowband PCS includes an allocation of spectrum, a flexible regulatory structure, and technical and operational rules. Issues regarding licensee selection procedures and the regulatory status of the service are the subject of legislation activity being considered by the Congress and will be addressed by the Commission in a further action.<sup>27/</sup>

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<sup>25/</sup> NPRM at ¶ 18.

<sup>26/</sup> See Budget Act, § 6002(e).

<sup>27/</sup> *First Report and Order*, 73 Rad. Reg. 2d (P&F) at 437.



The further rulemaking has been initiated in Gen. Docket 93-252 and PP Docket 93-253, and initial comments were filed last week. Until these rulemaking proceedings are completed, the Narrowband PCS rules remain a technical shell with no provision for filing and processing applications. Accordingly, there is no opportunity for Mtel to file an application to capitalize on its pioneer's preference award.

In a transparent attempt to stake an equitable claim and affect the outcome of this rulemaking, Mtel filed an application for a nationwide Narrowband PCS channel *one week after* the NPRM in this proceeding was issued.<sup>29/</sup> Mtel wantonly ignored the fact that there are no rules in place that permit the application to be filed. BellSouth has filed a motion asking the Commission to return this unauthorized application.<sup>29/</sup> The Commission should ignore Mtel's attempt to bias the outcome of this proceeding through its application filing.

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<sup>28/</sup> Mobile Telecommunication Technologies Corporation, FCC Forms 401 and 155, File No. \_\_\_\_\_, dated October 28, 1993 (filed October 29, 1993). Mtel did not serve a copy of the application on parties objecting to the award of the pioneer's preference, including BellSouth.

<sup>29/</sup> See "Emergency Motion For Return Of Application," filed by BellSouth Corporation, BellSouth Telecommunications, Inc., BellSouth Cellular Corp., and Mobile Communications Corporation of America, captioned with reference to the Mtel application as well as Gen. Docket 90-314, ET Docket 92-100, File No. PP-37, Gen. Docket 93-252, PP Docket 93-253, and this docket (November 12, 1993).

The disposition of the Narrowband preference requests is anything but final.<sup>30</sup> As the Commission noted elsewhere in the NPRM, several parties to the Narrowband PCS proceeding have filed petitions for reconsideration asking that Mtel be required to pay an auction price for its license.<sup>31</sup> The Commission stated that it intended to consider those submissions *both* in the Narrowband PCS docket and in this proceeding.<sup>32</sup> Thus, the Commission has expressly *not* precluded the possibility of requiring Mtel to participate in the auction, as would occur if the pioneer's preference policy were eliminated.

### **III. IF THE COMMISSION CONTINUES SOME FORM OF PIONEER'S PREFERENCE POLICY, IT MUST ADOPT NEW PROCEDURES**

Although BellSouth urges the Commission to eliminate the pioneer's preference policy on legal and policy grounds, it agrees with the Commission that, if a preference policy is retained, new procedures are needed. Change is needed, but the Commission's proposal does not go far enough.

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<sup>30</sup> BellSouth and another party have appealed the Narrowband PCS preference award to the D.C. Circuit, *BellSouth Corp. v. FCC*, No. 93-1518 (D.C. Cir. filed Aug. 20, 1993), and numerous petitions for reconsideration have been filed. BellSouth seeks reversal of the award of a preference to Mtel because of the seriously flawed procedures used to arrive at that award. Others are seeking both to overturn the award to Mtel and to obtain additional preference awards. In ruling on the petitions for reconsideration, the Commission will have the opportunity to reassess the propriety of the procedures it followed, in light of the record here. All aspects of the disposition of the preference requests thus remain to be decided. Elimination of the pioneer's preference policy would moot BellSouth's pending appeal of the Narrowband award and the other pending cases.

<sup>31</sup> NPRM at n.12.

<sup>32</sup> *Id.*

BellSouth has previously demonstrated the major legal and procedural flaws in the existing pioneer's preference procedures, as applied in the Narrowband PCS docket.<sup>33</sup> Although the Commission rejected BellSouth's criticisms there, the present proceeding gives it the opportunity to consider those objections further in reformulating its rules, before BellSouth's appeal<sup>34</sup> is decided.

If there is to be a preference policy, the Commission should not entertain or consider preference requests until it has adopted a report and order establishing rules for a new service, spectrum allocation, or technology. Within a short period after release of the report and order (*e.g.*, 30 days), the Commission should allow the filing of preference requests. Comments and replies would then be filed, evidence taken, and hearings or *en banc* sessions held if necessary. The Commission should then issue a decision disposing of the preference requests. Immediately following this decision, the Commission should announce the application filing deadline and the auction date. In addition, the Commission should condition any license awarded on the basis of a pioneer's preference to ensure that the awardee in fact uses the technology that won it the preference.<sup>35</sup>

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<sup>33</sup> BellSouth's arguments against the pioneer's preference scheme, as applied in the Narrowband PCS dockets, are discussed in the *First Report and Order*, 73 Rad. Reg. 2d (P&F) at 458-60.

<sup>34</sup> *BellSouth Corp. v. FCC*, No. 93-1518 (D.C. Cir. filed Aug. 20, 1993).

<sup>35</sup> Right now, there is no such requirement. When the Commission allocates spectrum or creates a new service, it often adopts very general, flexible technical rules. Under this approach, a licensee is permitted to use any number of technologies under the rules. Thus, a company that receives a pioneer's preference based on a new technology currently has no obligation to use that technology when it receives a license. For example, the Commission awarded Mtel a pioneer's preference in the Narrowband PCS band, but it did not require Mtel to utilize the technologies on which the award was based. Instead, Mtel is free to use its guaranteed license to construct a conventional one-way paging network, if it chooses to do so.

As BellSouth showed in its comments and reply in the Narrowband PCS pioneer's preference proceeding, the current tentative decision/final decision scheme is clearly unlawful as applied and should be eliminated. The Commission should defer the entire process of considering pioneer's preferences until after it has concluded a given rulemaking. Under the current scheme, the tentative preference winners are named at the same time as a notice of proposed rulemaking is issued. These tentative winners have the incentive to urge the Commission to grant few licenses (thereby minimizing the number of competitors with whom they must contend), grant large blocks of spectrum (thereby improving the value of a pioneer's preference), and issue licenses for large service areas (thereby increasing the value of a preference substantially). This is true even if the preference request is based on an efficient, small-scale technology.<sup>39</sup> By eliminating any consideration of pioneer's preference issues while rules are being formulated, the Commission would eliminate the potential for biasing its proceedings due to the self-interested viewpoints of the designated winners.

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<sup>39</sup> For example, the Commission tentatively awarded a Broadband PCS preference to one company for a technique it had allegedly developed to allow PCS to coexist with fixed microwave users and thereby use spectrum efficiently. *New Personal Communications Services*, Gen. Docket 90-314, *Tentative Decision and Memorandum Opinion and Order*, 71 Rad. Reg. 2d (P&F) 683, 685-86 (1992). After the company was tentatively awarded a preference, it filed comments urging the Commission to license only two PCS providers, issue licenses for Major Trading Areas, and grant each licensee 40 MHz. Its comments took the position that despite the sharing technique it had developed, PCS licensees would require an amount of clear spectrum "comparable to the amount of spectrum held by cellular licensees." Comments of American Personal Communications at 14, Gen. Docket 90-314, filed Nov. 9, 1992. Because only a portion of the spectrum can be cleared, it urged an allocation of 40 MHz, stating that "spectrum occupied by [incumbent microwave] licensees within PCS allocations could be unavailable permanently to PCS." *Id.* at 9.

Accordingly, BellSouth supports the Commission's proposal (in the event pioneer's preferences are not eliminated) to do away with the designation of tentative preference winners at the NPRM stage. BellSouth disagrees, however, with the Commission's proposal to continue to require preference requests filings before a rulemaking is commenced. This would still have many of the adverse effects discussed above, even if no action is taken until rules are ultimately adopted in the proceeding. Those who have filed preference requests have at least some expectation of an ultimate award and will slant their comments in the rulemaking to enhance their chances. Moreover, the pre-NPRM filing cannot reflect the value of the filer's participation in the rulemaking. That can be assessed only after the rulemaking is complete.

Moving all consideration of pioneer's preferences proceeding to the post-report and order stage, as BellSouth proposes, would allow the Commission to proceed with rulemaking free of the encumbrance of having to reach a simultaneous decision on who should receive a preference. This would be a more efficient use of the Commission's resources. Moreover, the Commission would avoid having to shield the pioneer's preference part of its proceedings from *ex parte* presentations at the same time as it permits such presentations on the rulemaking part of the proceedings. Parties could present technical data in support of policy objectives without that data contaminating a contemporaneous restricted pioneer's preference proceeding.

BellSouth supports the Commission's proposal to limit consideration to preference requests that involve the use of new technologies, and not merely the transfer of an

existing technology to a new frequency band.<sup>37/</sup> While there may be considerable engineering challenges in adapting a technology to a new frequency band, this is not true innovation -- "the introduction of something new".<sup>38/</sup> Adapting old technology to a different frequency band does not satisfy this definition.

## CONCLUSION

BellSouth urges the Commission to terminate its program of awarding licenses noncompetitively to those deemed innovators. Market forces, through bidding at auctions, are a better way ensure that valuable innovation is rewarded. The authorization of auctions eliminates any policy grounds for awarding pioneer's preferences. The pioneer's preference system is incompatible with the statute and contrary to the public interest.

The elimination or modification of the pioneer's preference program should apply to all pioneer's preferences that have not resulted in the final award of licenses -- Narrowband and Broadband PCS in particular. If the Commission retains the pioneer's preference system in modified form, it should end its current cumbersome and counterproductive procedures and instead entertain preference requests, if at all, only

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<sup>37/</sup> NPRM at ¶ 17. BellSouth believes the Commission is correct in focusing on new technologies, rather than new services. This is consistent with Section 303(g) of the Communications Act, which directs the Commission to "[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest." 47 U.S.C. § 303(g). Moreover, it will discourage parties from dreaming up a new "service" in order to warrant a preference, despite the use of a well-developed technology.

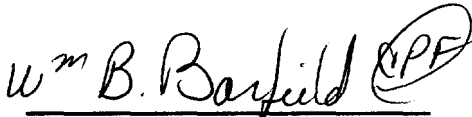
<sup>38/</sup> WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1166 (Merriam-Webster, 1986).

after a given spectrum rulemaking has been concluded. Preference awardees should not be exempted from participating in auctions.

Respectfully submitted,

BELLSOUTH CORPORATION  
BELLSOUTH TELECOMMUNICATIONS, INC.  
BELLSOUTH CELLULAR CORPORATION  
MOBILE COMMUNICATIONS CORPORATION  
OF AMERICA

By:

  
William B. Barfield  
Jim O. Llewellyn

1155 Peachtree Street, N.E.  
Atlanta, Georgia 30367-6000

By:

  
L. Andrew Tollin  
Michael Deuel Sullivan

Wilkinson, Barker, Knauer & Quinn  
1735 New York Avenue, N.W.  
Washington, D.C. 20006  
(202) 783-4141

By:

  
Charles P. Featherstun  
David G. Richards

1133 21st Street, N.W.  
Washington, D.C. 20036  
(202) 463-4132

Their attorneys.

November 15, 1993

CERTIFICATE OF SERVICE

I, Carol Frensilli, a paralegal in the office of BellSouth Corporation in Washington, DC, do hereby certify that copies of the foregoing "COMMENTS" were served upon the below-listed individuals by hand-delivery this 15th day of November, 1993.

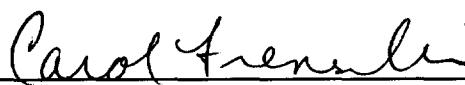
The Honorable James H. Quello  
Interim Chairman  
Federal Communications Commission  
Room 814  
Washington, DC 20554

The Honorable Andrew C. Barrett  
Commissioner  
Federal Communications Commission  
Room 844  
Washington, DC 20554

The Honorable Ervin S. Duggan  
Commissioner  
Federal Communications Commission  
Room 832  
Washington, DC 20554

Thomas P. Stanley  
Chief Engineer  
Office of Engineering and Technology  
Federal Communications Commission  
Room 7002  
Washington, DC 20554

Bruce Franca  
Deputy Chief Engineer  
Office of Engineering and Technology  
Federal Communications Commission  
Room 7002  
Washington, DC 20554

  
\_\_\_\_\_  
Carol Frensilli